No. 83-305

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Appellate Committee of the
California District Attorney's
Association

MICHAEL E. NAIL
District Attorney of the
County of Solano
State of California

JOHN R. VANCE, JR.
Deputy District Attorney
321 Tuolumne Street
Vallejo, California 94590
(707) 553-5321

Attorneys for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The California District Attorney's Association is a nonprofit organization which represents the fifty-eight District Attorneys within the State of California. The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorney's offices throughout the State for the purpose of presenting their views in cases which may have major statewide impact upon the prosecution of criminal offenses. The Appellate Committee has filed numerous amicus curiae briefs in the California Supreme Court. It has also filed such briefs in various Federal Courts as well as this Court.

After review of the matter, the Committee concluded that the case at bench will have a substantial impact upon the administration of justice in criminal cases throughout the State of California, if not the entire United States. Accordingly, the Committee has decided to request permission to file an Amicus brief in this case and has asked the District Attorney of Solano County to prepare it.

The concern of the Appellate Committee is that this Court will be speaking for the first time on an issue that is most important to each of the fifty-eight District Attorneys in California: What are the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as the collection and preservation of physical evidence is concerned. We very strongly believe that the decision by the California Court of Appeal in People v.

Trombetta (1983) 142 Cal.App.3d 138, 190 Cal.Rptr. 319, to the extent it interpreted the due process requirement of the Fourteenth Amendment, has confused the duty of the courts to insure that a trial is fair with the function of legislature.

In Trombetta, the California Court of Appeal held that the results of an intoxilyzer test which determines the blood alcohol content of a person's breath would be inadmissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution unless "the captured evidence or its equivalent" was retained for retest by person tested.

The Appellate Committee of the California District Attorney's Association's argument about due process is quite simple, as well as straight forward: if results of a scientific

test (such as in the instant situation, the intoxilyzer) is admissible because its results are reliable, due process does not change this result merely because, with the march of techology, a technique has arguably been developed which allows these initial results to be verified at a later date.

The Appellate Committe of the California District Attorney's Association has reviewed all the pleadings filed so far in this Court. We have also reviewed the pleadings which have been filed below. We note that in the Court of Appeal, Amici Curiae appeared on behalf of the respondents. We finally note that because of our concern over the potential impact of Trombetta, the undersigned was requested to, and did, file a brief seeking review in the California Supreme Court.

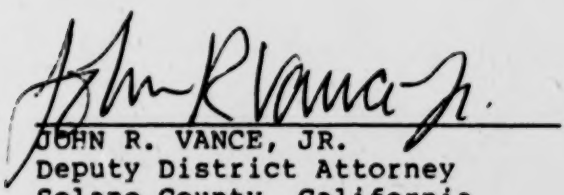
While in full agreement with each and every argument made by the Attorney

General in this case, the Appellate Committee of the California District Attorney's Association is concerned that this Court should see the full implications of due process.

DATED: February 23, 1984

Appellate Committee of the
California District Attorney's
Association

MICHAEL E. NAIL
District Attorney
Solano County

BY: 

JOHN R. VANCE, JR.
Deputy District Attorney
Solano County, California

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BRIEF OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER, THE PEOPLE OF THE STATE OF CALIFORNIA

This brief is filed pursuant to Rule 36.3 of the Supreme Court Rules. Consent to file has been granted by the Honorable John Van De Kamp, Attorney General of California, Counsel for Petitioner; consent has been denied by

John F. DeMeo, Esq., Counsel for Albert W. Trombetta. No response has been received as of February 17, 1984, from Attorney for Gregory M. Ward, Thomas R. Kenny, Esq., Attorney for Michael G. Cox, Thomas N. Muldoon, Clinton J. Brown, Densel L. Furner, Patricia L. Keeffe, Herbert J. Berryessa and James K. Schneider, and John A. Pettis, Esq., Attorney for Gail B. Berry, hereinafter called "defendants". A letter of consent of the Petitioner has been filed with the Clerk of this Court.

INTEREST OF AMICUS

The interest of the Appellate Committee of the California District Attorney's Association is as set forth in the motion for leave to file brief amicus curiae.

FACTS AND PROCEDURAL SETTING OF THIS CASE

The operative facts of this case have been thoroughly presented in the opinion

of the California Court of Appeal in People v. Trombetta (1983) 142 Cal.App.3d 138, 190 Cal.Rptr. 319.

Briefly, these operative facts do not turn upon the individuality of each situation--there are ten separate cases before the court--but rather follow similar group characteristics. Each defendant was stopped by a law enforcement officer within the State of California. During the course of that detention, the officer formed probable cause to arrest the driver for driving under the influence of intoxicating liquors.[1] Upon being arrested, each

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1. California Vehicle Code, Section 23152(a) and (b), provides: "(a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle. (b) It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

defendant elected to allow the State to make a blood alcohol determination of his breath by means of an instrument known as the Intoxilyzer.

It is the functioning of that machine which is at issue. The Trombetta Court, though summarizing the operation itself, cited with approval the opinion in People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341, for an explanation of the machine's functioning. According to Miller, 52 Cal.App.3d at 668-669, 125 Cal.Rptr. at 322:

> "The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one side to a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clear air is first tested, then the breath of the subject. The chamber is

> then purged by blowing clear air through it. The clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test results, save the printout card, was available for preservation."

The Court of Appeal concluded in Trombetta that the Due Process Clause of the Fourteeneth Amendment required that when a person was arrested for driving while under the influence of intoxicating liquors, and elected to take a breath test, the results would be inadmissible because the machine did not retain for possible retesting a portion of the sample that had been temporarily collected, and the State did not collect an independent sample of the defendant's breath. (142 Cal.App.3d, at 144, 190 Cal.Rptr., at 323). In the words of the Court: "Due process demands simply that when evidence is collected by the State,

as it is with the Intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant." (Id.)

The Trombetta Court felt that this conclusion was mandated by the decision of the California Supreme Court in People v. Hitch (1974) 12 Cal.3d 641, 117 Cal.Rptr. 9, which in turn was purportedly based upon this Court's decision in Brady v. Maryland (1963) 373 U.S. 83, 87, and the decision in United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642, 647-648.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment prevents a criminal trial from being reduced to a farce or sham. Above that minimum, the states may administer their courts in any manner they choose. The California Court of Appeal in

People v. Trombetta (1983) 142 Cal.App.3d 138, 190 Cal.Rptr. 319, did not follow this very basic distinction. As the evidence of the result of the intoxilyzer was admissible before the advent of possible technology to "preserve the sample or its equivalent", the march of technology does not change what is required by due process.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ENTAIL THAT WHEN A PERSON HAS BEEN ARRESTED FOR DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUORS AND ELECTS TO TAKE A BREATH TEST, THAT THE STATE MUST ALSO PRESERVE THE CAPTURED EVIDENCE OR ITS EQUIVALENT IN SOME MANNER.

The Due Process Clause of the Fourteenth Amendment protects each of use from conviction for a criminal offense without "due process of law". While indeed due process is not a static concept, Frank v. Maryland (1959) 359

U.S. 360, 371-372; Rochin v. California (1951) 342 U.S. 165, 170, to hold, as the California Court of Appeal did in this case, that the State must preserve "the captured evidence or its equivalent" is a gross abuse of judicial discretion.

It is an abuse of discretion because the results are not needed to insure a fair trial. As such it does a grave disservice to the rights of each of use to be governed by our duly elected legislators. It also does a grave disservice to the rights of each of us to be free from the menace--a menace many times all too deadly--of the drunk driver. This menace has been recognized both by this court, South Dakota v. Neville (1983) ___ U.S. ___, ___, 74 L.Ed.2d 748, 755 ("The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented

and needs no detailed recitation here"); Breithaupt v. Abram (1957) ___ U.S. 432, 439 ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"), and by the California Supreme Court, Burg v. Municipal Court (1984) 35 Cal.3d 257, 261-262, 198 Cal.Rptr. 145, 146 ("The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation.").

This Court has clearly over many years, and in many cases, defined the meaning of due process in a criminal trial. In the seminal case of Lisenba v. California (1941) 314 U.S. 219, this court said, "As applied to a criminal trial, denial of due process is the failure to observe the fundamental fairness essential to the very concept of

justice." 314 U.S., at 236. Mr. Justice Roberts continued in that case by saying, "In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." 314 U.S., at 236. In Rochin v. California (1952) 342 U.S. 165, Mr. Justice Frankfurter said, "[I]n reviewing a state criminal conviction under a claim of right guaranteed by the due process clause of the Fourteenth Amendment from which is derived the most far reaching and most frequent basis for challenging state and criminal convictions, 'we must be deeply mindful of the responsibilities of the states for enforcement of criminal laws, and exercise with due humility our negative function in subjecting convictions from state courts to the very narrow scrutiny which the due process clause of the

Fourteenth Amendment authorizes'". 342 U.S., at 168. Mr. Justice Frankfurter continued, "Regard for the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense.'" 342 U.S., at 169. Explaining Rochin in Breithaupt v. Abram (1957) 352 U.S. 432, 436 this Court said, "[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court

has established the concept of due process." Mr. Justice Douglas said for this court in United States v. Augenblick (1969) 393 U.S. 348, 356, "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place where the barriers are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal than a disciplined contest." Coming forward finally a few more years, Mr. Justice Powell wrote, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." Chambers v. Mississippi (1973) 410 U.S. 284, 294.

The touchstone, then, of due process is the assurance of a fair trial. As such this Court finds due process as setting forth what could only in reality be said

to be a minimum. Above that minimum there are many social choices left to the states in the manner that trials may be conducted. Brown v. Mississippi (1936) 297 U.S. 278, 285 ("The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy . . . [But] it does not follow it may substitute trial by ordeal."); Rochin, supra. Depending upon one's view, these choices, when made, may provide more or less of an opportunity for fairness. But above this minimum these are choices to be made by the legislature, not dictated by the courts.

The California Court of Appeals in Trombetta could only have reached the conclusion it did by committing what perhaps is a subtle but yet substantive mistake. To find that due process required preservation of "the captured

evidence or its equivalent" the Court, by necessity, was finding that the only way that a defendant could determine the validity of the results was to conduct a test on "the captured evidence or its equivalent". If indeed the validity of the results can only be determined by such a procedure, then the results when such technology does not exist would be, by definition, inadmissible. But yet, if that is not the case--and it is not--then the converse cannot also be true. The Appellate Committee of the California District Attorney's Association submits that the logic of Trombetta eschewed this contradiction, and founders upon it.

The scientific acceptance, and hence, the concommitant admissibility of breath alcohol testing has been well established in California. (People v. Suddeth (1966) 65 Cal.2d 543, 546, 55 Cal.Rptr. 393,

395; Lawrence v. City of Los Angeles (1942) 53 Cal.App.2d 6, 8, 127 P.2d 288, 289.) While this Court has never spoken to the issue of what is required for the admissibility of evidence based upon a scientific principle, other courts including California's have. The seminal case in this area must be the decision in Frye v. United States (D.C. Cir. 1923) 293 F. 1013. The essence of the Frye test is whether the scientific procedure is reliable. (293 F. at 1014; People v. Kelly (1976) 17 Cal.3d 24, 30, 130 Cal.Rptr. 129, 134.) Reliability in the context of the intoxilyzer is simply the accuracy of the methodology. Breath testing equipment in California must be approved by the California Department of Health. Their expertise has been accepted both by the Legislature, Cal. Health & Saf. Code, § 436.50, and the

courts, People v. French (1978) 77 Cal.App.3d 511, 521, 143 Cal.Rptr. 782; and Intoximeters, Inc. v. Younger (1975) 53 Cal.App.3d 262, 271, 125 Cal.Rptr. 864, People v. Miller (1975) 52 Cal.App.3d 666, 670, 125 Cal. Rptr. 341. The accuracy and reliability of breath-testing instruments is particularly well-assured in California:

> "First, the instrument on which the immediate analysis is performed is one which has been evaluated and found to meet the required performance standards. From the periodic determinations of accuracy there is current evidence with regard to the accuracy of that individual instrument. There is no human manipulation associated with the test: the subject's mouth is on the instrument, the subject breathes directly into the instrument, the instrument collects the appropriate breath sample, the instrument does the analysis without any manipulation by the operator (this is the reason for technically untrained officers being permitted to perform breath tests [Section 1221.1(b)(1)]), the result is calculated by the instrument and the test result

> is recorded in printed form by the instrument. Adding to this the fact that California requires the analysis of two separate breath samples which cannot differ from each other by more that 0.02 grams percent, there is not scientific need to retain a breath sample because there is no room for undetected error." Advisory Committee on Alcohol Determination, Dept. of Health, Notes of Meeting of August 31, 1982, p. 31.

It is indeed so well established that no appellate court in California has ever excluded the results of the intoxilyzer--the instrument in question in Trombetta--on the grounds of lack of scientific reliability, nor did--and this is most important--the Trombetta court. The issue to be decided in Trombetta was defined by them in the following terms: "The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virture of the failure

of law enforcement officials to preserve a retestable breath sample." 142 Cal.App. 3d, at 140, 190 Cal.Rptr., at 320. Later in their opinion, they said "In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial." 142 Cal.App.3d, at 143, 190 Cal.Rptr., at 323.

That the technology might exist to preserve an untested sample of a defendant's breath might well be relevant consideration for a policy decision by a legislator.[2] But it is wholly irrelevant for a due process analysis by a court, and therein lies the flaw in the Court of

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2. Whether or not such policy arguments were considered, one legislature did enact such a requirement. Vt. Stats. Ann. tit. 23 § 1203(a) (1981).

Appeal's opinion: it was not a violation in their view of due process to admit the the results until the technology existed. If it was not a violation of due process in the first instance, it cannot be now made so by the advance of technology.

Due process is not license. Breithaupt, supra. It is rather a very disciplined as well as well defined constitutional precept. Frank, supra. That is not to say that it is static. Rochin, supra. Yet while dynamic it is not endowed with the power to elevate ordinary policy determinations--policy determinations which have nothing at all to do with a fair trial--to ones of constitutional dimension. Augenblick, supra; Lisbena, supra.

The Trombetta court justified their decision in the following manner.

They found, contrary to the trial court,[3] and contrary to another appellate court (People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341) that the intoxilyzer did collect the breath of the subject, i.e., physical evidence. 142 Cal.App.3d at 143-144, 190 Cal.Rptr. at 322. They also "found" that there existed a device whereby an actual sample of breath may be collected for later analysis by an expert of the defendant's choosing (an "intoximeter field crimper--indium tube encapsulation kit"). Id. Whereupon they fashioned a requirement of preservation of the "captured evidence or its equivalent," 142 Cal.App.3d at 147, 190 Cal.Rptr. at 323, based upon, as noted, Hitch.

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3. There was only testimony taken on this issue in one of the ten cases before this Court. It was People v. Albert Trombetta. The trial judge found that no sample was collected. See decision, J.A., p. 40.

To Hitch, then, and the cases Hitch relied upon, Brady and Bryant, we must turn. Rather than start with Hitch, we shall start where Hitch began: Brady v. Maryland.

In Brady this Court found that the suppression by the prosecution of a confession of a co-defendant which was exculpatory violated the Due Process Clause of the Fourteenth Amendment. This Court fashioned the following rule "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to the punishment irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87.

The other case relied on extensively by Hitch was Bryant. While Brady is clear, Bryant itself is not and by the

time it was interpreted by the California Supreme Court, the principle of Brady had been wholly lost.

The confusion engendered by Bryant stems from its analysis of destruction of a tape recording in a menage of both constitutional and statutory authority, all under the aegis of this Court's decision in United States v. Augenblick (1969) 393 U.S., at 348.

For the purpose of Bryant, at issue in Augenblick was a tape recording made of a confession. At the trial, the existence of a tape recording was disclosed. 393 U.S., at 353-354. But the government was unable to produce it. Id., at 354. This court found that indeed the tapes should have been preserved under the Jencks Act--which describes certain discovery procedures in criminal cases (18 U.S.C.

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§ 3500)[4]--and disclosed, but found that the failure to produce it was not sufficient to infect the defendant's conviction. 393 U.S., at 356.

The Augenblick Court explained--and it is this explanation which the Bryant court ran afoul--"Indeed our Jencks decision and the Jencks Act were not cast in constitutional terms . . ." 393 U.S., at 356. Significant for determining the ambit of the decision, the Augenblick Court said in a passage completely ignored by Bryant: "[The court below] in a conscious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks act and made a denial of discovery which 'seriously impeded his right to a trial' a violation of the Due Process Clause of the

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4. It is derived from Jencks v. United States (1967) 353 U.S. 657.

Constitution.'" 393 U.S., at 356. But this Court disagreed. No error--certainly no error of constitutional magniture--had been committed by the loss of the tape. This Court wrote, "It may be that in some situations, denial of production of a Jencks Act type of statement might be a denial of a Sixth Amendment right." (Id.) Lest there by any mistake that what this Court was positing was indeed a hypothetical situation, the Court continued by saying, "But certain it is that this case is not a worthy candidate for consideration at the constitutional level." (Id.) As we have noted above, this Court said, "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal, . . . than a disciplined

contest." Id. And Augenblick's was not such a trial. Id.

Bryant involved the "loss" of tape recordings made by police officers of purchases of narcotics. Under the Jencks Act,[5] the court held that the tape recording was one that should have been preserved and disclosed. (439 F.2d, at 649-650.) Bryant then turned to sanctions for its loss. Interpreting Augenblick, the Bryant court indicated that the "key" would be the circumstances of its loss. 439 F.2d, at 651. "[Augenblick] also suggests that, while sanctions should be imposed in cases of bad faith suppression of evidence, an exception will be made for good faith

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5. The court also relied on Rule 16(a), Fed. R. Crim. P. which provides "for Court ordered discovery of 'written or recorded statements or confessions made by the defendant.'" and Rule 16(b) which "makes discoverable before trial 'books, papers, documents, tangible objects . . .'" 439 F.2d., at 649.

loss." Id. All of this Bryant found to be "explicitly based on constitutional reasoning." Id. Finally Bryant found that where evidence has been destroyed, the convictions will not be reversed only so long as "the government made 'earnest efforts' to preserve critical materials and to find them once a discovery request is made." Id.

In interpreting Augenblick, the Bryant court made two basic errors. Augenblick was not "explicitly based on constitutional reasons". At most the Augenblick court indicated that in some circumstances the denial of production of a Jencks Act type of statement "might be a denial of a Sixth Amendment right." Augenblick, supra, 393 U.S., at 356. This Court in Augenblick explicitly held that where the ultimate fate of a missing tape remains "a mystery," such does not implicate the Due Process Clause. Id.

The second error is as fundamental. The Bryant court contrasted their situation with Brady in the following way: in Brady the nature of the lost evidence was known, Bryant, supra, 439 F.2d, at 647. Whereas in their case the nature of the lost evidence was not. Bryant, supra, 439 F.2d, at 647-648. We disagree. The lost tape recordings at issue in Bryant were of conversations with a government agent who related them in court. Id., at 645. The Bryant court said about these tapes, "[I]t is possible, after all, that the tapes might have revealed [that the agent was mistaken in his recollection.]" 439 F.2d, at 645 (emphasis added). Without wholly debasing the meaning of the word "possible", there was no possibility within any meaningful sense. The only available evidence established that such a result was impossible.

In the same sense that Bryant used the word "possible," it would then be possibile that everyone present at the conversation talked only about football, opera or philosophy, or that the tape would reveal that no one at all was present, not even the agent. Using the meaning of "possible" ascribed to it by the Bryant court, anything is "possible." Such contingent speculation demeans due process. In infusing due process with such contingent speculation, it runs afoul of Augenblick. In Augenblick, this Court did not speculate that the lost tape might have indicated that the defendant did not, contrary to the testimony of the police officer, confess. 393 U.S., at 355-356. By not so speculating, this Court clearly had indicated that contingent speculations are not the stuff of due process. Bryant, then, is a very bad decision.

We now come forward to Hitch. Hitch, like Trombetta, involved a prosecution for driving while under the influence of intoxicating liquors. In Hitch, the defendant elected to have his breath tested by means of a machine called "Breathalyzer". (12 Cal.3d, at 644, 117 Cal.Rptr., at 11.) In essence, the defendant would blow into the breathalyzer which collects his breath in a test ampoule. Id. Then by means of a light beam this test ampoule would be compared to a known reference ampoule. Id. Both ampoules were capable of preservation, but both were destroyed. (12 Cal.3d, at 645-646, 117 Cal.Rptr., at 11-12.) Based upon Brady and more particular Bryant, the California Supreme Court found Federal Due Process to have been transgressed by this destruction and consequently held that there was a duty to preserve the

test ampoules. (12 Cal.3d, at 645-646, 117 Cal.Rptr., at 11-17.) The California Supreme Court thereby committed the same error as was committed by Trombetta; if the only way the accuracy of the machine can be determined is by checking the actual samples themselves, then the results in the first instance should not be admissible.

As of this date, more cases have rejected Hitch, vis-a-vis retention of ampoules from breathalyzers, than have followed it. See State v. Phillipe (Fla. App. 1981) 402 S.2d 33, 34; People v. Stark (Mich. App. 1977) 251 N.W.2d 574, 575-577; State v. Teare (N.J. Super. 1974) 336 A.2d 511, 513; People v. LaPree (Rochester City Ct. 1980) 430 N.Y.S.2d 778, 781-781; State v. Larson (N.D. 1976) 313 N.W.2d 750, 755-756; State v. Shutt (N.H. 1976) 363 A.2d 406, 407; State v. Watson (Ohio App. 1975) 355 N.E.2d 883,

884-885; Edwards v. State (Okla. Crim. App. 1976) 544 P.2d 60, 62-64; Edwards v. Oklahoma (W.D. Okla. 1976) 429 F.Supp. 668, 670-671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978); State v. Newton (S.C. 1980) 262 S.E.2d 906, 909; State v. Helmer (S.D. 1979) 278 N.W.2d 808, 810-811; Turpin v. State (Tex. Crim. App. 1980) 606 S.W.2d 907, 916-917; State v. Canady (Wash. 1978) 585 P.2d 1185, 1187-1188. Following Hitch are: Lauderdale v. State (Alaska 1976) 548 P.2d 376; Scales v. City Court (Ariz. 1979) 594 P.2d 97; People v. Ricter (N.Y. Sup. 1980) 423 N.Y.S.2d 610; State v. Michneer (Ore. App. 1976) ___ P.2d 449; State v. Booth (Wis. 1980) 295 N.W.2d 194.

In People v. Santiago (Sup. Ct., N.Y. Co., 1982) 455 N.Y.S.2d 511, the court rejected Hitch only after conducting a test to see whether Hitch's

assumption that a retest was possible was valid. Id., at 516-517. The result of the test should be shocking to those who believe, as Hitch did, that a retest was possible. Though "possible," the results were not at all accurate; indeed a retest showed that there was alcohol present when there was none in the breath! Id.

In the view of the Appellate Committee of the California District Attorney's Association, an even more significant rejection of Hitch has come from the scientific community. The Committee on Alcohol and Drugs of the National Safety Council said in a formal statement issued on October 2, 1975:

> "Some issues have been raised in the California Supreme Court's decision in People v. Hitch and allied cases in which the court held that chemicals and ampoules used in breath test cases must be preserved for possible pre-trial examination and analysis by defendants should they so demand it. A review of the

> scientific merits of this position has been made. It is concluded that at the present time, a scientifically valid procedure is not known to be available for the re-examination of a Breathalyzer ampoule that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis." 22 J. Forensic Science 486 (1977)."

Recently, Professor John Thornton, an associate professor of forensic science in the Department of Biomedical and Environmental Health Science at the University of California at Berkeley, wrote of Hitch that: (1) there was scientifically no possible way to retest the ampoule, and (2) such analysis "would have been meaningless." Thornton, Uses and Abuses of Forensic Science, 69 A.B.A.J. 288, 292 (March 1983). He continued, "The decision . . . was foolish from the standpoint of science." Id.

Hitch was an "accidental" decision. Johnson, The Supreme Court of California

1975-76: Forward: The Accidental Decision and How it Happens (1977) 65 Cal. L. Rev. 231, 234-239. In terms of both science and the law, it was a bad accident.

Hitch, to the extent that it follows Bryant's error, diverges from this Court's definition of due process and the meaning of Brady. The evidence in Hitch was like the tape in Augenblick: neither are like the confession in Brady. In Hitch, it is only contingently possible that a retest would contradict the results. Such speculation does not implicate the Due Process Clause of the Fourteenth Amendment. Lisenba, supra; Rochin, supra; Breithaupt, supra; Chambers, supra; Augenblick, supra.

One court has concluded that indeed Hitch does unjustifiably extend Brady. Edwards v. Oklahoma (W.D. Okla. 1976) 429 F.Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978). That

court wrote: "The Hitch court found that it sufficed that there was a 'reasonable possibility' that they [the ampoules from the breathalyzer] might constitute favorable evidence. This extension of the Brady doctrine is not justified as a matter of constitutional law. Brady focused upon the harm to the defendant resulting from nondisclosure. Hitch diverts this concern from the reality of prejudice to speculation about contingent benefits to the defendant. Hitch was, as Trombetta is, but legislation.[6] As such it provides

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6. One author has also seen through the due process gloss of Hitch. See Note, 75 Colum. L. Rev. 1355, 1376 (1976).

no basis for the Trombetta decision of the California Court of Appeal.[7]

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7. The conundrum that unprincipled application of due process causes can be best seen by the fact that there are many decisions which find no due process violation when a piece of evidence which must be tested to determine its contents is consumed in the testing process. See People v. Vick (1970) 11 Cal.App.3d 1058, 1966, 90 Cal.Retr. 236, 241-242 (autopsy; body destroyed); People v. Shafer (1950) 101 Cal.App.2d 54, 59, 224 P.2d 778, 780 (chemical test; substance destroyed); State v. Lightle (Kan. 1972) 502 P.2d 834 (chemical test; pills destroyed); State v. Carlson (Minn. 1978) 267 N.W.2d 170 (chemical test; bloodstain destroyed); State v. Cloutier (Me. 1973) 302 A.2d 84 (chemical test; pill destroyed); Partin v. State (Ga. 1978) 232 S.E.2d 46 (chemical test; cocaine destroyed); United States v. Love (5th Cir. 1973) 482 F.2d 213, 218219 (chemical test; gun powder residue destroyed); State v. Thomas (Wash. 1969) 454 P.2d 203 (chemical test; marijuana sample destroyed.

CONCLUSION

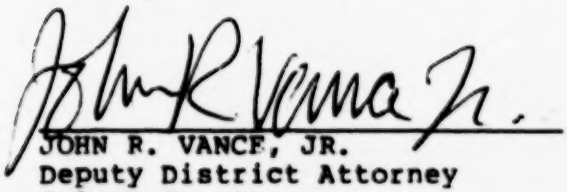
The Appellate Committee of the California District Attorney's Association respectfully submits that for the foregoing reasons the Due Process Clause of the Fourteenth Amendment does not require that the State obtain either "the capture of evidence or its equivalent." The decision of the California Court of Appeal must be reversed.

DATED: February 23, 1984

Respectfully submitted,

Appellate Committee of the
California District Attorney's
Association

BY: MICHAEL E. NAIL
District Attorney
Solano County



JOHN R. VANCE, JR.
Deputy District Attorney
Solano County

Attorneys for Amicus Curiae